

Decision **DRAFT DECISION OF ALJ KOSS** (Mailed 7/1/2004)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of the City of Bakersfield to construct Akers Road, a public street, across the tracks of the Union Pacific Railroad Company (Operated by the San Joaquin Valley Railroad) in City of Bakersfield, County of Kern.

Application 02-04-037
(Filed April 19, 2002)

In the Matter of the Application of the City of Bakersfield to construct Harris Road, a public street, across the tracks of the Union Pacific Railroad Company (Operated by the San Joaquin Valley Railroad) in City of Bakersfield, County of Kern.

Application 02-04-038
(Filed April 19, 2002)

In the Matter of the Application of the City of Bakersfield to construct Mountain Vista Drive, a public street, across the tracks of the Union Pacific Railroad Company (Operated by the San Joaquin Valley Railroad) in City of Bakersfield, County of Kern.

Application 02-04-039
(Filed April 19, 2002)

In the Matter of the Application of the City of Bakersfield to construct Old River Road, a public street, across the tracks of the Union Pacific Railroad Company (Operated by the San Joaquin Valley Railroad) in City of Bakersfield, County of Kern.

Application 02-04-040
(Filed April 19, 2002)

**OPINION AUTHORIZING THE CITY OF BAKERSFIELD
TO CONSTRUCT FOUR NEW AT-GRADE CROSSINGS
ACROSS THE TRACKS OF THE UNION PACIFIC RAILROAD COMPANY**

I. Summary

The City of Bakersfield (City) is authorized to construct at-grade railroad crossings over tracks owned by the Union Pacific Railroad Company (UPRR) and operated by the San Joaquin Valley Railroad (SJVR) at Akers Road, Harris Road, Mountain Vista Drive, and Old River Road. Upon completion of the above projects, the City is authorized to close the existing at-grade crossing at Pacheco Road over these same tracks. The protest and concurrent request to file late protest filed by the Commission's Consumer Protection and Safety Division (Staff), are denied. No other protests were filed. These proceedings are closed.

II. Proceeding Consolidated

The subject applications each involve similar questions of fact or law. As provided in Rule 55 of the Commission's Rules of Practice and Procedure (Rules), the applications were consolidated into one proceeding through a ruling dated November 12, 2003, issued by the assigned Administrative Law Judge (ALJ). The consolidation of these proceedings is affirmed.

III. Staff's Late-Filed Protest Denied

The protest and concurrent motion for leave to file late protest filed by Staff are denied. The subject applications were first noticed in the Commission Daily Calendar on April 25, 2002. Rule 44.1 requires that protests must be filed within 30 days of the first calendar notice. Rule 87 allows for deviations from the Rules if good cause can be shown. Staff filed its protest and motion for leave on January 7, 2003 (eight months after the protest period ended), citing concerns regarding the proximity of the proposed crossings to existing crossings, non-

crossing alternatives for public access, and the practicability of constructing grade separated crossings.

The motion for seeking to file late showed that Staff discussed the applications with the two involved railroad companies, UPRR and SJVR, in July 2002 (two months after the protest period ended) to determine if either railroad would file a protest. Staff also performed an on-site diagnostic safety review of the proposed crossings and met with representatives of the City in October 2002 (five months after the protest period ended).

On January 23, 2003, the City filed an opposition to the Staff's protest and motion, asserting that Staff was fully aware of the applications and able to file its own timely protest, and that no changes had occurred in the design or plans of each crossing since the application filing date. On October 8, 2003, the City filed a motion requesting the Commission to approve the four applications as no valid protests or responses to the applications were filed.

Staff's protest and motion were both denied by the assigned ALJ's ruling of November 12, 2003 for failure to show good cause. The ALJ's ruling is affirmed.

IV. Prehearing Conference

A prehearing conference (PHC) was held on December 3, 2003, to discuss the City's compliance with Rule 38 (requirements for constructing a public roadway across a railroad) and Rule 17.1 (requirements for the submission of necessary environmental impact reports) and to establish a temporary service list to the proceeding. Pursuant to Rule 6.2, the City filed a PHC statement on November 25, 2003, to further describe the public need, impracticability of a grade separation, elimination of safety hazards, and emergency response time impacts of each proposed crossing. At the conclusion of the PHC, the City was

directed to prepare and file by December 15, 2003, a revised map clarifying the location of the proposed crossings and their relation to other crossing sites and grade separations within the city. The City complied and provided two maps and a further explanation of the sites.

V. Discussion

The City is requesting authority, under Pub. Util. Code §§ 1201-1205, to construct and maintain new at-grade railroad crossings at four locations in the southwest section of the City. Through its applications and supplemental filings, the City has provided all of the necessary information and maps to meet the requirements of the Rules. Issues relevant to constructing a public road across a railroad (Rule 38) are discussed below, followed by a separate discussion on environmental impact issues (Rule 17.1).

A. Public Need

The Metropolitan Bakersfield 2010 General Plan (general plan) was first adopted in 1990 and updated in February 2003. In response to expected population growth, the general plan calls for major construction of new housing and commercial development in the southwest portion of the City on previously undeveloped lands, including a new junior high school adjacent to the proposed crossing at Mountain Vista Drive. The general plan was completed after public notice and hearings. The initial and updated versions of the general plan both describe and contemplate the necessity of the proposed crossings to serve the new southwest development and find that the subject crossings will improve access and traffic circulation, reduce congestion, and improve air quality. The City is in the process of installing all of the necessary roads, utility lines, and other infrastructure and services to serve this development, consistent with the general plan.

The City asserts the four new crossings are also necessary to enhance public safety and emergency response. The formal correspondence file in this proceeding includes separate letters from the Fire Chief and Police Chief of the City. Fire Chief Ron Frazee (August 29, 2003 letter) advises a new fire station is planned near Mountain Vista Drive and Harris Road and that fire department response times would be severely impacted without the Mountain Vista Drive crossing. Frazee further explains that the Akers Road crossing is necessary to reach emergencies on the south side of the railroad tracks. Police Chief Eric Matlock (September 11, 2003 letter) urges approval of the subject crossings to allow for a more rapid response by all agencies providing emergency services in the growing southwest portion of the City.

B. Train and Motor Vehicle Traffic

As called for in the general plan, the crossings at Akers Road, Mountain Vista Drive, and Old River Road will be along UPRR's Buttonwillow branch line and the crossing at Harris Road along UPRR's Sunset branch line. The Buttonwillow branch carries approximately 22 trains per week. The Sunset branch is used primarily to stage trains for movement on and off the Buttonwillow branch. Both branch lines are single-track and carry no rail passenger traffic. Train speed on both lines is limited to 10 miles per hour (mph).

The projected annual average daily traffic (AADT) count for motor vehicles using the crossings is 3,000 at Akers Road; 6,500 at Harris Road; 3,800 at Mountain Vista Drive; and 2,500 at Old River Road. The two branch lines merge near the intersection of Progress Road and Pacheco Road. Pacheco Road runs adjacent and parallel to the Buttonwillow branch line and the City intends to remove a three-mile segment of Pacheco Road and close the existing unsignalized at-grade crossing at that location. The proposed new crossing at

Harris Road will essentially replace the Pacheco Road crossing. Each new crossing will be located approximately ½ mile away from the next nearest crossing along these same branch lines.

C. Crossing Safety

Safety is the overriding issue of importance in authorizing the approval for any at-grade crossing. The construction and safety features of all four crossings shall be in compliance with all applicable safety requirements, including Commission General Order (GO) 26-D (clearances), GO 72-B (pavement construction), GO 75-C (crossing protection), and GO 118 (walkways). At each crossing, the City proposes to install four No. 9 gates and automatic crossing signals (as defined in GO 75-C), two on each side of the crossing. All track and roadway segments will be straight and flat. The rail-highway intersects will be at 90 degree angles with no line-of-sight obstacles for either trains or vehicles. The crossings will be constructed of pre-cast concrete panels and fully signalized with standard advanced warning signs, pavement markings and striping.

The unique facts of each request for an at-grade crossing are reviewed on a case-by-case basis to determine the need for the crossing balanced against the needs of safety. In this case, the City has shown the proposed at-grade crossings will provide an adequate level of safety when considering the traffic volumes, train speeds, crossing protection devices, rail/highway crossing angles, and sight lines.

D. Practicability

In applications for at-grade crossings, the Commission has the discretion to approve the request, order a separation of grade or deny the application. Grade separated crossings provide a higher level of safety than

at-grade crossings and Pub. Util. Code § 1202 (c) gives the Commission the exclusive power to require, where in its judgment it would be practicable, a separation of grades at any crossing. In this case, grade separation will not be required for the reasons discussed below.

The issue of practicability has been addressed in several previous Commission orders, including Decision (D.) 82-04-033 (City of San Mateo), D.92-01-017 (City of Oceanside), and D.98-09-059 (City of San Diego). These cases all involved passenger rail traffic, a high number of trains (ranging from 22 to 150 per day), and high train speeds (up to 70 mph). These past applications were all denied, based in part on the number of trains and train speeds and also on the position of various federal rail and highway safety agencies that, generally stated, opposed any at-grade crossings along mainline track with high-speed passenger train traffic.

In D.02-05-047 (Pasadena Blue Line), the Commission further defined practicability by establishing a list of six issues to be used as criteria for judging practicability in future grade crossing cases. This decision granted authority to construct 28 new at-grade crossings along the 13-mile Pasadena Blue Line light rail system having 200-250 trains per day with train speeds up to 55 mph. The unique facts related to the 28 new crossings, the proposed crossing protection and safety and the issues presented in the *San Mateo* case were all considered. The six issues established in the *Blue Line* case for judging practicability are discussed below.

1. *Applicant to show all potential safety hazards eliminated.* As described above, all crossings will be protected by four #9 crossing gates (two in each direction) with automatic crossing signals. Crossing surfaces will be straight and flat at 90-degree angles with no line of sight obstructions for trains

or vehicles. Train volume will be 2-3 trains per day at speeds of 10 mph. The AADT ranges from 2,500 to 6,500 vehicles.

2. *The concurrence of local authorities.* The subject crossings are all included in the City's general plan and local community authorities have reviewed and approved the relevant issues of the general plan.
3. *The concurrence of local emergency authorities.* The police chief and fire chief of Bakersfield each have letters on file supporting approval of the crossings and stating the need to enhance emergency response times.
4. *The opinions of the general public.* The subject crossings are included in the City's general plan. The general plan was developed after public notice and comment and no party from the general public filed any opposition or comment to the proposed crossings.
5. *Comparative costs of an at-grade crossing to a grade separation (less persuasive than safety concerns).* The estimated cost of an at-grade crossing is \$250,000 at each location. The estimated cost for a grade separation at each location is:
 - Akers Road: \$10 million. Includes condemnation of 30-40 existing homes.
 - Harris Road: \$6 million. Replaces the existing crossing at Pacheco Road.
 - Mountain Vista Drive: \$9 million. An overpass would be necessary due to a nearby canal, with overhead power lines being relocated. Access to the new junior high school would be limited.
 - Old River Road: \$9 million. An overpass is necessary due to two nearby canals. Acquiring 10-20 homes or relocate one of the canals would also be necessary.
6. *A recommendation by Staff that it concurs in the safety of the proposed crossing.* Staff did not file a timely protest, but clearly does not concur in the safety of these crossings.

However, as we have discussed previously, we believe that the at-grade crossings will provide an adequate level of safety.

Since the *Blue Line* case, several other requests for at-grade crossings have been granted. Among those are D.03-08-047 (City of West Sacramento) that authorized an at-grade crossing of a short-line freight railroad, D.03-12-038 (San Luis Obispo) that authorized a private at-grade railroad crossing to remain open (with improvements) near the California Polytechnic State University campus, and D.03-12-018 (City of San Diego) that authorized an at-grade crossing over six sets of tracks (three light rail and three heavy rail). The San Luis Obispo crossing had 13 trains per day (passenger and freight) with heavy pedestrian and bicycle traffic by students accessing the university and was the site of three previous fatal accidents. The San Diego crossing is adjacent to the convention center and new downtown baseball stadium and had traffic volumes of 170 light rail trains and 7 heavy rail trains per day and with an AADT of 25,000 vehicles.

The above cases are examples where the unique facts presented overcame any presumption against an at-grade crossing. In the subject proceeding, the City has proposed crossing safety measures that will provide an adequate level of safety when considering the low volume of train traffic (2-3 per day), the low train speed (10 mph), the type of crossing (flat, no line of sight difficulties), and the type of railroad line (single track branch line with no rail passenger traffic). After considering all of the above issues, grade separations will not be ordered.

E. Construction

The City implemented a regional fee program to fund the construction of the subject crossings and all construction costs will be the responsibility of the City. As requested by the City, the authority to construct the subject crossings will be in effect for a period of two years. To ensure proper maintenance of the crossings, the City and the UPRR are directed to enter into a written agreement on the apportionment of maintenance costs within 30 days of the effective date of this order.

The new crossings are assigned the following Commission identification numbers:

Akers Road: BT-320.00

Harris Road: 042-0.60

Mountain Vista Drive: BT-324.00

Old River Road: BT-323.50

To keep an accurate recording of construction and maintenance activity, the City is directed to file with Staff, prior to construction, the final construction plans and a copy of the written maintenance cost apportionment agreement. Within 30 days after completion of the work under this order, the City shall notify Staff in writing by submitting for each crossing a completed standard Commission Form G (Report of Changes at Highway Grade Crossings and Separations).

F. Environmental Review

The City is the lead agency for compliance with the California Environmental Quality Act of 1970 (CEQA), as amended, Public Resources Code Sections 21000, *et seq.* The Commission is in the role of responsible agency under CEQA. CEQA requires the Commission to consider the environmental

consequences of a project that is subject to its discretionary approval. In particular, a responsible agency must consider the lead agency's environmental impact report or negative declaration that no significant harm will come to the environment as a result of the project prior to acting upon or approving the project (CEQA Guidelines, Section 15050(b)). The specific activities that must be conducted by the responsible agency are contained in CEQA Guidelines, Section 15096.

In its applications, the City states that construction of the subject crossings is exempt from CEQA, pursuant to Section 15061(b)(1) of the CEQA Guidelines (general rule). The City, as lead agency, conducted a full environmental review of the general plan. In March 1990, the City adopted and certified a final Environmental Impact Report (EIR) for the 1990 general plan (State Clearinghouse No. 89070302). The roadway portion of each crossing is a continuation of an existing road and the EIR describes and analyzes each in detail. The City updated its general plan in February 2003. The EIR for the updated plan was completed and certified on December 11, 2002. The updated EIR analyzed and reviewed the circulation plan element and the environmental impact of the road improvements that necessitate the crossings.

On September 20, 2002, pursuant to § 15062(b)(1) of the CEQA Guidelines, the City filed a Notice of Exemption (NOE) from CEQA for the proposed crossing projects with the County of Kern and the State of California, Office of Planning and Research. Through this filing, the City determined that construction of the four proposed crossings along the existing Union Pacific tracks would not have any significant impact on the environment. The NOE states that construction of the four proposed crossings would have no significant effect on the environment regarding aesthetics, biological resources, hazardous

material, mineral resources, public services, utilities, agricultural resources, cultural resources, hydrology, water quality, wetlands, noise, recreation, air quality, geology, soils, land use, population, housing, transportation, and traffic.

In particular, the NOE notes that all public works projects in the City involving any biological resources are required to comply with the City's Metropolitan Bakersfield Habitat Conservation Plan (MBHCP) and Section 10(a) permit. Additionally, all local road projects are subject to the terms of the MBHCP and associated permits issued to the City by the United States Fish and Wildlife Service and the California Department of Fish and Game. Compliance with the MBHCP mitigates biological impacts to an impact level that is less than significant. The NOE included projected traffic volume levels for the four crossings, stating that the purpose of the four grade-level crossings is to further connect the existing circulation system to the City. The NOE found that the roadway portions will meet all the standards of the City and that traffic control devices and markings will meet all standards and regulations of Caltrans. Finally, the NOE found that crossing arm and signal device designs will meet all state and federal standards and regulations and that the four crossings are consistent with the adopted Metropolitan Bakersfield Circulation Element.

Accordingly, we believe the City reasonably concluded that the project will not have a significant effect on the environment and we adopt the City's findings that the project is exempt from CEQA pursuant to CEQA Guidelines, Section 15061(b)(1). The construction and operation of the subject crossings are consistent with the development described in the general plan approved in the EIR.

VI. Categorization

This proceeding was preliminarily categorized as ratesetting and preliminarily determined not to require a hearing, pursuant to Resolution ALJ-3087, dated May 2, 2002. We conclude that the proceeding is properly categorized and, with the denial of Staff's protest, a public hearing is unnecessary.

VII. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Kenneth L. Koss is the assigned ALJ in this proceeding.

VIII. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7. Comments were filed on _____, and reply comments were filed on _____.

Findings of Fact

1. On April 19, 2002, the City filed separate applications requesting authority to construct new at-grade crossings at Akers Road, Harris Road, Mountain View Drive, and Old River Road over railroad tracks owned by the UPRR and operated by the SJVR.

2. The City intends to close the existing unsignalized at-grade crossing at Pacheco Road over the same tracks once the four new crossings are constructed. The proposed new crossing at Harris Road will essentially replace the Pacheco Road crossing.

3. The four subject applications contain similar questions of fact on law and were consolidated into a single proceeding by the assigned ALJ in a ruling dated November 12, 2003.

4. The City's general plan was first adopted in March 1990 and later updated in February 2003.

5. The general plan calls for major residential and commercial development in the southwest portion of the City.

6. The general plan finds the subject crossings are necessary to improve traffic circulation, reduce congestion, and improve air quality.

7. In a letter dated August 29, 2003, the Fire Chief of the City advised a new fire station is planned near Mountain Vista Drive and Harris Road and that fire department response times would be severely impacted without the proposed Mountain Vista Drive crossing. The letter, included in the formal correspondence file to this proceeding, also states the proposed Akers Road crossing is necessary to reach emergencies on the south side of the railroad tracks.

8. In a letter dated September 11, 2003, the Police Chief of the City urged approval of the subject applications and states the new crossings are necessary to provide for more rapid response times by all agencies providing emergency services in the southwest portion of the City. The letter is in the formal correspondence file to this proceeding.

9. The proposed crossings at Akers Road, Mountain Vista Drive, and Old River Road will cross over the UPRR Buttonwillow branch line. The proposed crossing at Harris Road will cross over the UPRR Sunset branch line.

10. The Buttonwillow and Sunset branch lines carry no rail passenger traffic.

11. The Buttonwillow and Sunset branch lines are single-track with train speeds limited to 10 mph in the area of the proposed crossings.

12. The Buttonwillow branch line carries approximately 22 trains per week.

13. The Sunset branch line is used primarily to stage trains for movement on and off the Buttonwillow branch.

14. The projected AADT count for motor vehicles using the crossings is 3,000 at Akers Road; 6,500 at Harris Road; 3,800 at Mountain Vista Drive; and 2,500 at Old River Road.

15. Each new crossing will be located approximately ½ mile from the next nearest crossing along the same branch lines.

16. At each proposed crossing, the City will install four No. 9 gates and automatic crossing signals (as defined in GO 75-C), two on each side of the crossing.

17. All track and roadway segments near the proposed crossings will be straight and flat with no line-of-sight obstacles for either trains or vehicles.

18. The crossings will be constructed of pre-cast concrete panels and fully signalized with standard advanced warning signs, pavement markings and striping.

19. All potential safety hazards associated with the crossing will be eliminated.

20. Local authorities support the project.

21. Local emergency authorities support the project.

22. There is no local opposition to the projects.

23. Costs of grade separations are prohibitive.

24. The City will be responsible for all construction costs, unless otherwise agreed to by UPRR.

25. The crossing must be adequately maintained and the associated costs apportioned according to a written agreement between the City and the UPRR.

26. The City requested the authority to construct the proposed crossings be in effect for a period of two years.

27. The proposed crossings are assigned the following Commission crossing identification numbers:

Akers Road: BT-320.00

Harris Road: 042-0.60

Mountain Vista Drive: BT-324.00

Old River Road: BT-323.50

28. The City is the lead agency for compliance with CEQA.

29. The Commission is the responsible agency under CEQA for these projects and has reviewed and considered the City's environmental documentation upon which the City relied in adopting its findings.

30. The City conducted a full environmental review of its general plan.

31. In March 1990, the City adopted and certified a final EIR for the general plan (State Clearinghouse No. 89070302).

32. The City updated its general plan in February 2003.

33. The EIR for the updated general plan was completed and certified on December 11, 2002.

34. The updated EIR analyzed and reviewed the circulation plan element and the environmental impact of the road improvements that necessitate the proposed crossings.

35. On September 20, 2002, pursuant to CEQA Guidelines, Section 15061(b)(1), the City filed an NOE from CEQA for the proposed crossing projects with the County of Kern and the State of California, Office of Planning and Research.

36. The NOE determines that construction of the proposed crossings would have no significant impact on the environment.

37. The proposed crossing projects are subject to the City's MBHCP.

38. Compliance with the MBHCP mitigates biological impacts to a level that is less than significant.

39. The proposed crossing projects comply with the MBHCP.

40. Staff filed a protest and concurrent motion for leave to file late protest on January 7, 2003, eight months after the protest period ended. The motion was denied by the ALJ.

Conclusions of Law

1. The proposed at-grade crossings at Akers Road, Harris Road, Mountain Vista Drive, and Old River Road should be approved.

2. The subject applications should be consolidated into a single proceeding.

3. The proposed crossing protection and warning devices are adequate for the projected traffic.

4. The Commission should adopt the findings of the NOE filed by the City that the proposed crossing projects are exempt from CEQA.

5. There is no need for an evidentiary hearing.

6. The ruling which denied the motion for leave to file a late protest filed by Staff should be affirmed.

7. The consolidated applications should be granted as set forth in the following order.

O R D E R

IT IS ORDERED that:

1. The City of Bakersfield (City) is authorized to construct at-grade highway-rail crossings over tracks owned by the Union Pacific Railroad

Company (UPRR) and operated by the San Joaquin Valley Railroad (SJVR) at Akers Road, Harris Road, Mountain Vista Drive, and Old River Road.

2. The four subject applications are consolidated into this single proceeding.
3. Commission identification numbers for the new crossings shall be:

Akers Road: BT-320.00

Harris Road: 042-0.60

Mountain Vista Drive: BT-324.00

Old River Road: BT-323.50.

4. Crossing warning devices shall conform to Commission's General Order (GO) 75-C.

5. Clearances at the crossings shall be in accordance with GO 26-D.

6. Walkways shall conform to GO 118. During construction, walkways adjacent to any rail operations shall be maintained free of obstructions and shall be promptly restored to their original condition in the event of any damage caused by the construction.

7. Pavement construction shall conform to GO 72-B.

8. All costs associated with the construction of the proposed crossings shall be the responsibility of the City, unless otherwise agreed by the UPRR.

9. The crossings shall be adequately maintained and within 30 days of the effective date of this order, the City and the UPRR shall enter into a written agreement on the apportionment of maintenance costs and responsibilities for the four crossings named above.

10. Prior to construction, the City shall file with the Commission's Consumer Protection and Safety Division (Staff), final construction plans and a copy of the written maintenance cost apportionment agreement between the City and UPRR.

11. This authorization shall expire if not exercised within two years unless the Commission grants an extension. The authorization may be revoked or modified if public safety, convenience or necessity so requires.

12. Within 30 days after completion of the authorized construction, the City shall submit a completed Commission Form G (Report of Changes at Highway Grade Crossings and Separations) to Staff.

13. The Staff's protest and concurrent leave to file late protest, filed on January 7, 2003, are denied.

14. The four consolidated applications are granted, as set forth.

15. Application (A.) 02-04-037, A.02-04-038, A.02-04-039, and A.02-04-040 are closed.

This order is effective today.

Dated _____, at San Francisco, California.

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(END OF ATTACHMENT)